Supreme Court, U.S.
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No. 93-1187

In the

Supreme Court of the United States

October Term, 1994

Torwico Electronics, Inc.,
Petitioner,

v.

State of New Jersey, Department of Environmental Protection and Energy,
Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the obligation of petitioner to comply with state and federal regulatory requirements associated with the generation and use of hazardous substances constitutes a dischargeable "claim" under 11 U.S.C. 101(5) and Ohio v. Kovacs, 469 U.S. 274 (1985), where, as in this case, the State is merely seeking performance by the debtor which does not give rise to a "right to payment."

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COUNTERSTATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to challenge a determination of the United States Court of Appeals for the Third Circuit holding that the enforcement of state statutes imposing regulatory requirements on the generation, use and disposal of hazardous substances and waste that require performance and not payment do not constitute "claims" subject to discharge and are therefore enforceable against debtors in bankruptcy. The court below correctly found that in this matter the State was seeking compliance by petitioner with its obligations under the New Jersey Environmental Cleanup Responsibility Act ("ECRA"), N.J. Stat. Ann. 13:1K-6 et seq., and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901-6991, and that the State's enforcement of the law does not constitute the act of a creditor trying to achieve a preference over other creditors. Thus, the State was not asserting a "claim" as that term is defined in the Bankruptcy Code and should not have been enjoined by the Bankruptcy Court from enforcing its laws against petitioner.

1. Statutory Background

ECRA, now the Industrial Site Recovery Act ("ISRA"), 1993 N.J. Laws 139, was enacted in 1983 for the purpose of protecting the public from having to bear the expense of cleaning up abandoned plant sites contaminated with hazardous wastes. See generally, J. Schmidt, New Jersey's Experience Implementing the Environmental Cleanup Responsibility Act, 38 Rutgers L. Rev. 729 (1986). To achieve this goal, ECRA provides that, upon the closure, sale or transfer of an industrial establishment, the owner or operator of the industrial establishment must either submit a cleanup plan to the Department detailing the measures necessary to detoxify the property, or obtain a "negative declaration" from the Department that there has been no discharge of hazardous substances or wastes or that any such discharge has been cleaned up and there remain no hazardous substances or wastes on the property. N.J. Stat.

Ann. 13:1K-8(g).[1] "Industrial establishments" are those (1) at which hazardous substances or wastes are present and (2) which also have a designated reference number as determined by the Standard Industrial Classification ("SIC") manual published by the Federal Office of Management and Budget. N.J. Stat. Ann. 13:1K-8f.

In enacting ECRA, the New Jersey Legislature recognized that the generation, handling, storage and disposal of hazardous substances and wastes pose an inherent risk of harm, and the closing of operations and the transfer of real property where hazardous substances were used must be conducted in a rational and orderly way so as to mitigate potential risk. N.J. Stat. Ann. 13:1K-7. The magnitude of New Jersey's hazardous waste problem is beyond dispute. Matter of Kimber Petroleum Corp., 110 N.J. 69, 88 (1988), 539 A.2d 1181, 1190 (Wilentz, C.J. dissenting). Decades of industrial activity have left the State with a legacy of hazardous waste. That legacy now threatens the State's public health and ecology. In Re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 446 (1992), 608 A2d 288, 289. Public money does not even "begin to meet New Jersey's cleanup needs." Kimber, 110 N.J. at 89; 539 A2d 1101, 1191. The Legislature decided that the obligation to clean up the contaminated sites rests with the polluters themselves. Id. at 90.

Although ECRA does not impose an independent duty to clean up the property during a period of operation, the owner cannot walk away after deciding to cease operations without developing and implementing a cleanup plan. Dixon Venture v. Dixon Crucible Company, 122 N.J. 228, 584 A.2d 797 (1991). Furthermore, ECRA was

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[1] The State, therefore, does not "choose to proceed under ECRA" as petitioner maintains (Pet. Brief at 17, n. 19). ECRA is triggered automatically, imposes a self-executing duty to comply on the owner or operator, and does not provide the State with a "right to payment" at all.

intended to impose upon both the owner and the operator of an industrial establishment a "self-executing duty to remediate" upon closure, sale or transfer of certain potentially polluted properties.[2] See Superior Air Products Co. v. N.L. Industries, Inc., 216 N.J. Super. 46, 62, 522 A.2d 1025, 1041 (App. Div. 1987), certif. den., 126 N.J. 308, 598 A.2d 872 (1991).[3] By the express terms of the statute, compliance with ECRA "constitute[s] [a] continuing regulatory obligation ... imposed by the State." N.J. Stat. Ann. 13:1K-12.

As a generator of hazardous waste, petitioner is also required to comply with obligations emanating from the Resource Conservation and Recovery Act, which was enacted by Congress to regulate the treatment, storage, and disposal of hazardous wastes. See Matter of Commonwealth Oil Refining Company, 805 F.2d 1175 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987) (the objective of RCRA is "to promote the protection of health and the environment" and "[a]n injunction which does not compel some expenditure or loss of monies may often be an effective nullity"). The Environmental Protection Agency ("EPA") delegated the enforcement of RCRA to the State of New Jersey in 1983, and the State thereafter promulgated implementing regulations under the Solid Waste Management Act ("SWMA"), N.J. Stat. Ann. 13:1E-1 et seq. See N.J.

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[2] Torwico's lease agreement with George Allen Associates, however, clearly identified Torwico as the party responsible for complying with ECRA. ECRA allows such an agreement to transfer joint and several liability to one party in this way. See 1993 N.J. Laws 139, section 20.

[3] Petitioner's comments are misleading when citing Superior Air Products. "New Jersey courts have concluded that ECRA and the Spill Act apply "in pari materia." (Pet. Brief at 16, n. 5). Petitioner's implication to the contrary notwithstanding, the court concluded that such an application of ECRA and the Spill Act illustrated that the State cannot be sued under the Environmental Rights Act to enforce the Spill Act against a responsible party when ECRA has been triggered. This is exactly the opposite of what petitioner is advocating.

Admin. Code. 7:26-1 et seq (setting forth, inter alia, requirements for disposal of hazardous wastes). See generally, W. Mugdan and B. Adler, 1984 RCRA Amendments: Congress as Regulatory Agency, 10 Columbia J. of Env. L. 215.

2. History of These Proceedings

Petitioner, Torwico Electronics, Inc. ("petitioner" or "Torwico"), a manufacturer of electronic transformers, is an "industrial establishment" as that term is defined in ECRA and a "generator" of hazardous waste as defined by RCRA. Up until 1985, petitioner conducted its business at a site located in Lakewood, New Jersey. In 1985, it relocated to a new site in Lakewood, where it continued to manufacture transformers until it sold its business in 1993, a fact that is of significance to the dischargeablity of a "claim" but which petitioner failed to disclose in its brief. [4] Petitioner became responsible for ECRA compliance in 1985 when it ceased operating at its original Lakewood site and transferred its operations to another location. See N.J. Stat. Ann. 13:1K-9. Petitioner moved without complying with ECRA.

On August 4, 1989, Torwico filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Several months later, on November 13, 1989, the Department performed an inspection of Torwico's former site and discovered a hidden, illegal seepage pit (not a septic system, as petitioner alleges) (Pet. Brief at 5) containing

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[4] Thus, petitioner is now liquidating, rather than reorganizing, under Chapter 11 of the Bankruptcy Code. As a corporate debtor, petitioner will not be discharged of any obligations whether or not they constitute "claims." See 11 U.S.C. §1141 (d)(3) (confirmation of a plan does not discharge a corporate debtor if the plan provides for the liquidation of all or substantially all of the property of the estate and if the debtor does not engage in business after the consummation of a plan).

hazardous wastes (Ja219-Ja231)[5]. The contamination in the pit was found to be migrating off-site, into local waters and to be approaching a potable water supply (Ja230).

On April 9, 1990, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to petitioner (Pa61)[6]. Among other things, the Order required petitioner to apply for a permit for its seepage pit, obtain an identification number from the EPA, and develop a closure plan for the pit (Pa63). In response to the Administrative Order, petitioner filed a Summons and Complaint for Declaratory Judgment and Injunctive Relief against the Department, asking the Bankruptcy Court to enjoin the Department from enforcing any applicable environmental laws against petitioner (Ja6). Petitioner sought a declaratory judgment that any environmental obligations that petitioner may have were "claims" under 11 U.S.C. 101(5) and that the State's failure to file a timely proof of claim precluded the State from requiring petitioner to comply with New Jersey's environmental laws and regulations (Ja8). In August 1990, the Department issued a Notice of Violation of ECRA to both petitioner and George Allen Associates, Torwico's landlord and the owner of the Lakewood site. On November 26, 1990, petitioner moved for summary judgment on its Complaint (Ja14).

On December 6, 1990, the State filed a Notice of Cross-Motion for Summary Judgment arguing that Torwico's obligation to comply with New Jersey's laws does not constitute a "claim" that can be discharged in bankruptcy, but that such obligations are ongoing regulatory responsibilities imposed pursuant to the state's police

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[5] "Ja" cites are to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

[6] "Pa" cites are to Petitioner's Appendix.

powers, intended to protect the public health, safety, welfare, and environment (Ja11).

On September 6, 1991, the Bankruptcy Court issued its opinion, now published at 131 B.R. 561 (Pa22), finding that an action to compel compliance with environmental statutes constitutes an "unsecured claim" under 11 U.S.C. §101(5). 131 B.R. 561, 565 (Pa31-32). Because the State did not file a timely proof of claim, the State was barred from ever enforcing ECRA against Torwico. To reach this holding, the Bankruptcy Court first found that any action by the State under the State's police and regulatory powers to compel compliance with environmental laws constituted no more than the enforcement of a "money judgment" within the meaning of the automatic stay provisions of 11 U.S.C. §362(a), rather than "regulatory" obligations, and therefore is not exempt from the automatic stay provisions under 11 U.S.C. §362(b)(4) and (5). An order embodying the court's decision enjoining the State from enforcing certain environmental laws against petitioner and declaring certain portions of the ECRA statute and regulations void was entered on September 20, 1991 (Ja350).

On September 30, 1991, the State appealed to the United States District Court. On December 14, 1993, the Hon. Anne E. Thompson, United States District Judge, entered a Memorandum Opinion and Order vacating the Bankruptcy Court's injunction. The district court held that Torwico's obligation to comply with ECRA is not dischargeable in bankruptcy, and rejected the remainder of the Bankruptcy Court's decision (Pa21). Judge Thompson found that the State has no alternate payment remedy under ECRA and is attempting to remedy both past and ongoing

pollution. The district judge concluded that the State had no obligation to file a claim in the proceeding.[7]

On January 8, 1993, petitioner appealed the order of the district court to the United States Court of Appeals for the Third Circuit. On October 25, 1993, the Court of Appeals affirmed the decision of the district court finding that petitioner's obligation to comply with state and federal environmental laws was not a dischargeable "claim" and that petitioner's obligation to clean up "ran with the waste." Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental Protection and Energy, 8 F.3d 146, 151 (3d Cir. 1993). In coming to this conclusion, the Third Circuit relied on many of the same decisions of this Court and the Second and Seventh Circuits that petitioner mistakenly claims conflict with the opinion below.

REASONS FOR DENYING THE PETITION

This petition for a writ of certiorari should be denied because the decision of the Court of Appeals finding that petitioner's obligation to comply with state and federal regulatory requirements associated with the generation and use of hazardous substances does not constitute a dischargeable "claim" because it does not give rise to a

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[7] The Bankruptcy Court had held that certain sections of ECRA conflict with the Bankruptcy Code, and were therefore invalid under the Supremacy Clause. 131 B.R. at 573 (Pa49-Pa56). In addition, the Bankruptcy Court had held certain provisions of ECRA not in dispute in this case to be unconstitutional under the Supremacy Clause. Notably, the Bankruptcy Court did not limit its constitutional review of ECRA to the provision relevant to "claims"; rather, it reached out, sua sponte, to invalidate several other sections of ECRA that were not challenged by Torwico, and that were not in dispute in this case. See Ja6 (Torwico's complaint); compare 131 B.R. at 576 (Ja340-Ja341). This is part of the decision that was vacated by the District Court. Petitioner did not raise any issue as to the incorrectness of that aspect of the District Court's determination and appealed only the finding that since ECRA has no alternate payment remedy, an obligation to comply with ECRA does not constitute a "claim."

"right to payment", is in accord with the opinion of this Court in Ohio v. Kovacs, upon which the Court of Appeals relied in part, see, Torwico, 8 F.3d at 150, and does not conflict with the decisions of the other circuits. Contrary to the assertions of petitioner, the decision at issue, rather than conflicting with, was in accord with In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991), and Matter of CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992). See, Torwico, 8 F.3d at 149.

Petitioner's argument that this decision created a conflict among the circuits and with this Court's decision in Ohio v. Kovacs is entirely erroneous. Furthermore, much of the petition poses what is no more than a hypothetical situation. As misguided as petitioner's hypothesis is as to the deleterious effect on reorganization of compelling a debtor to comply with the law (See, 28 U.S.C. 959(b)) (requiring a debtor-in-possession or trustee to comply with state law throughout the bankruptcy), petitioner is also asking this Court to rule on facts that are not involved in this case. This debtor is not reorganizing. This corporate debtor has sold its business, has ceased operating and is liquidating, which means that there will be no discharge available to petitioner in any event. Thus, the precise issue upon which petitioner seeks certiorari does not arise on the facts of this case.

The notion that petitioner does not have to comply with New Jersey's laws because the Department did not file a proof of claim is legally incorrect. The State is a regulator in this case, not a creditor. The State's enforcement of its environmental regulations seeks compliance by the debtor with the law; it does not constitute the act of a creditor trying to devise a preference over other creditors. See In re Dolly Madison Industries, Inc., 504 F.2d 499, 503 (3d Cir. 1974) ("The mere fact that the debtor's property may be affected by state law does not constitute a 'claim' against that 'property'"). See, also, In re Quanta Resources Corp., 739 F.2d 912, 921-922 (3d Cir. 1984), aff'd sub nom.

Midlantic National Bank v. N.J. Dept. of Environmental Protection, 474 U.S. 494 (1986) ("It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation -- the substitution of governmental action for citizen compliance -- without an indication that Congress so intended.").

I. The Opinion Below Does Not Conflict With This Court's Opinion in Ohio v. Kovacs.

A. Ohio Had Barred Kovacs From Access To His Property, Appointed A Receiver To Perform The Cleanup And Then Consistently Sought The Payment Of Money.

Petitioner claims that the decision of the Court of Appeals is at odds with the opinion in Ohio v. Kovacs and that the State, in ordering petitioner to meet its statutorily-imposed environmental regulatory obligations, was seeking what is, in essence, the payment of a "money judgment." Petitioner fails to recognize that the narrow ruling of Kovacs is confined to a very specific set of facts that are widely divergent from the facts of this case.

In Kovacs, the State of Ohio sought to enforce an injunction it had obtained against an individual (Kovacs) for various environmental violations. The injunction required Kovacs to remove specified hazardous wastes from his property and to pay the State $75,000. Kovacs failed to comply with his obligations under the injunction. The State then obtained the appointment of a receiver to take possession of Kovacs' property and assets, and to implement the injunction by cleaning up the site. Ohio thereafter endeavored to recover its costs by maintaining

that the costs were not dischargeable "claims."[8] The Court held that Ohio was seeking to enforce a "right to payment." Therefore, it had a claim within the meaning of the definition of that term as used in 11 U.S.C. §101(5).

Contrary to the contentions of petitioner, the Court of Appeals considered Kovacs and correctly pointed out the key distinction in that opinion:

> [a]s Kovacs noted, a debtor cannot maintain an ongoing nuisance in direct violation of state environmental laws. The state can exercise its regulatory powers and force compliance with its laws, even if the debtor must expend money to comply. Under Kovacs, what the state cannot do is force the debtor to pay money to the state; at that point, the state is no longer acting in its role as regulator, it is acting as a creditor." [Torwico, 8 F.3d at 150].

Under the statutes involved in this case, New Jersey does not have the authority to accept money in place of performance from petitioner and then perform petitioner's obligations under ECRA and RCRA itself. In Kovacs, Ohio had already performed the cleanup and was merely trying to recover its costs. Ohio was a creditor of Kovacs'. In this matter, New Jersey is a regulator of all "industrial establishments" subject to ECRA and RCRA.

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[8] Petitioner points out that Ohio, like New Jersey, "also argued that it was seeking the performance of some action and not the payment of money." Pet. Brief at 15. However, here New Jersey is actually seeking performance, whereas Ohio was only seeking money.

The definition of a "claim" at 11 U.S.C. 101(5) is as crucial to the opinion in Kovacs as the particular circumstances of that case. Notably, the phrase "right to payment" is included in both paragraphs of the definition. See, 11 U.S.C. 101(5).[9] It is this "right to payment" that is missing from petitioner's obligations under ECRA and RCRA. Consequently, Torwico's regulatory requirements under those laws are not dischargeable "claims" under the Bankruptcy Code.

It was this "right to payment" which Ohio both had and endeavored to enforce that allowed the Court to determine that Ohio's injunction was no more than a money judgment. The Court stated, "At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money." 469 U.S. at 283.

In Kovacs, the debtor's lack of possession of the property in question was physical, legal and irreversible because, following the appointment of a receiver, Ohio undertook to perform the needed cleanup work itself. Since the debtor's lack of possession of the property constituted a real (and insurmountable) reason why the debtor could not perform the required cleanup work itself, the lack of possession tended to highlight the fact (conceded by the

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[9] (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. [11 U.S.C. §101 (5) Emphasis Added].

State of Ohio at oral argument) that Ohio was seeking only to enforce a monetary obligation.

In this case, by contrast, petitioner is not only physically able to gain access to the site to perform the needed cleanup work, petitioner is under a state court obligation to do so (Ja353-Ja354).[10] Furthermore, the landlord, George Allen Associates, has a legal obligation to grant petitioner access to the site to comply with ECRA, even if he had not obtained that court order or did not wish petitioner to return. The regulations found at N.J. Admin. Code 7:26B-1.12(b)(2), require a landlord or property owner to grant such access and remedies are provided by the ECRA amendments at 1993 N.J. Law, 139, section 40, if such access is not readily granted.

Despite the expressly narrow holding of Kovacs, petitioner construes that decision to apply to any action brought by a state agency to enforce an environmental obligation where a debtor cannot comply with the obligation without paying money. The Court of Appeals correctly rejected this reading of Kovacs, which has the dangerous potential of making bankruptcy law a haven for polluters. As this Court has held before, "[c]ongress has repeatedly expressed its legislative determination that the trustee is not to have carte blanche to ignore nonbankruptcy law....Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety." Midlantic, 474 U.S. at 502.

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[10] It should be noted that the Bankruptcy Court is required to give preclusive effect to that state court judgment. In re Rosemarie Brown, 951 F.2d 563 (3d Cir. 1991). At a minimum, therefore, Torwico must be considered to be in constructive possession of the site in question. See also, In re Morristown and Erie R. Co., 885 F.2d 98 (3d Cir. 1989) (11 U.S.C. §105 may be used by the Bankruptcy Court to enforce provisions in debtor's lease or contract of sale).

B. In Chateaugay, The Second Circuit Also Held That Kovacs Does Not Support The Position That Petitioner Is Advocating.

In Chateaugay, the EPA had issued an order under §106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. §9601 et seq., requiring a debtor to take certain cleanup actions. In addition, the EPA had filed a proof of claim for $32 million for expenses it had itself incurred under §107 of CERCLA in cleaning up contamination caused by the debtor. EPA contended that the debtor's obligation to comply with the cleanup order and to repay EPA's incurred expenses were not subject to discharge in bankruptcy.

The district court found the $32 million in response costs incurred by EPA to be a dischargeable claim. 944 F.2d at 1000. The district court further found that even claims for injunctive relief would be dischargeable if the injunctive remedy was an option EPA was electing to pursue, instead of incurring cleanup costs itself and thereafter seeking reimbursement. On the other hand -- and of direct importance here -- the district court concluded, "where there is no right to such payment for cleanup or other remedial costs, claims for injunctive relief do not fall within the Bankruptcy Code and are not dischargeable." Id. (emphasis added).

The Second Circuit, on appeal, gave close consideration to the Court's decision in Ohio v. Kovacs, and found that,

> to the extent that an order is obtained under CERCLA or any other environmental statute that seeks to end or ameliorate pollution, we are satisfied that nothing in Kovacs

> permits a discharge of such obligation [Chateaugay, 944 F.2d at 1009].

The court in Chateaugay concluded that Kovacs turned on the fact that a receiver had been appointed in that case, thereby precluding Kovacs from taking any steps to comply with the injunction in question, and restricting the State's legal options to obtaining monetary relief. Chateaugay, 944 F.2d at 1008-09. This reading of Kovacs gives full effect to the plain text of the opinion, in which the Court emphasized the narrowness of its holding. As the Second Circuit itself noted, its reading of Kovacs is also entirely consistent with Midlantic's holding that the Bankruptcy Code does not entitle a debtor to abandon property in violation of an environmental regulation "that is reasonably designed to protect the public health or safety from identified hazards." Chateaugay, 944 F.2d at 1009.

As the Second Circuit stated, "[i]t is difficult to understand how any injunction directing a property owner to remedy ongoing pollution could be a dischargeable 'claim' if, as Kovacs instructs, the owner 'may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.'" Id. (citations omitted). Petitioner rejects this straightforward and legally sound reading of Kovacs, and instead interprets that opinion to create a gaping exception to generally applicable environmental laws. This interpretation of Kovacs cannot withstand scrutiny.

C. The Court Has Rejected The View That A Claim Arises Merely Because A Debtor Must Expend Money To Meet Its Ongoing Regulatory Obligations.

Petitioner's contention that when a debtor in bankruptcy cannot clean up environmental contamination himself or itself without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy, renders the government's police power exemption for enforcement actions meaningless. This Court has rejected this assertion by expressly declining to disapprove of or overrule Penn Terra Ltd. v. Dept. of Environmental Resources("DER"), 733 F.2d 267 (3d Cir. 1984), which held that, simply because an injunctive action will require the debtor to expend funds, the action is not one to enforce a money judgment. The Third Circuit had aptly stated, "in contemporary times, almost everything costs something." 733 F.2d at 277. In Kovacs, this Court stated:

> [In Penn Terra] the Court of Appeals for the Third Circuit held that the automatic stay provision of 11 U.S.C. §362 did not apply to the State's seeking an injunction against a bankrupt to require compliance with the environmental laws. This was held to be an effort to enforce the police power statutes of the State, not a suit to enforce a money judgment. But in that case, there has been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits to enforce the

> regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt - what the Court of Appeals for the Sixth Circuit concluded was involved in this case - is another matter. [469 U.S. at 283, n.11.]

This Court's deliberate preservation of the Penn Terra holding makes clear that the Court of Appeals' decision in this matter was entirely in accord with Kovacs.

Furthermore, this Court effectively reaffirmed the Third Circuit's holding in Penn Terra recently in Board of Governors of the Federal Reserve System of the United States v. MCORP Financial, ___ U.S. __, 112 S.Ct. 459 (1991), in which the Court found that although enforcement proceedings might ultimately affect the Bankruptcy Court's control over the property of the estate, "that possibility cannot be sufficient to justify the operation of the stay against an enforcement proceeding that is expressly exempted by subsection (b)(4). To adopt such a characterization of enforcement proceedings would be to render 11 U.S.C. 362 (b)(4)'s exception almost meaningless."

This holding is identical to that in Penn Terra: just because compliance will require the debtor to expend money, an enforcement action is not subject to the automatic stay. Thus, it is clear that "Congress did not intend for the Bankruptcy Code to preempt all state laws," Midlantic, 474 U.S. at 505, which is what petitioner is advocating when it contends that if compliance with a law will require the debtor to spend money, then that law is unenforceable in bankruptcy. Were petitioner correct in asserting that any order which requires the expenditure of money is a dischargeable claim, "then the exception to section 362 for government police action, which should be

construed broadly, would instead be narrowed into virtual nonexistence." Penn Terra, supra, 733 F.2d at 277-78.

II. The Third Circuit's Decision Does Not Conflict With The Decisions Of Other Circuits.

The opinion below does not conflict with the Second Circuit's opinion in Chateaugay or with the Seventh Circuit's opinion in Matter of CMC Heartland as petitioner alleges. Ironically, the Third Circuit relied in part on both of these decisions to form its own conclusions: "We find CMC and Chateaugay to be both persuasive and consistent. Applying the precepts outlined in those cases to the situation here present leads us to conclude that Torwico's obligations under the administrative order do not constitute a claim." Torwico, 8 F.3d at 150..

A. The Second Circuit's Decision In Chateaugay Is Entirely In Accord With The Third Circuit's Decision In Torwico.

As noted above, in Chateaugay, the EPA had issued an order under §106 of CERCLA, requiring the debtor to take certain cleanup actions as well as an order for $32 million in expenses that the EPA had itself incurred under §107 of CERCLA in cleaning up contamination caused by the debtor. The district court found the $32 million in response costs incurred by EPA to be a dischargeable claim, 944 F.2d at 1000, but concluded, "where there is no right to such payment for cleanup or other remedial costs, claims for injunctive relief do not fall within the Bankruptcy Code and are not dischargeable." Id. The district court

> expressly rejected [the debtor's] contention that an injunction provision should be dischargeable "merely because the debtor would be

> required to expend money in order to comply with the injunction," ... and observed, "To accept that argument would render dischargeable any claims for injunctive relief other than those merely seeking the cessation of some unlawful activity. Such a reading would render the right to payment language set forth in the statute superfluous and would thus hardly be consistent with congressional intent." [944 F.2d at 1000].

On appeal the Second Circuit affirmed. Judge Newman, writing for the court, held that a cleanup order issued under §106 of CERCLA "no matter how phrased, [that] requires [a debtor] to take any action that ends or ameliorates current pollution ... is not a 'claim'." 944 F.2d at 1008. "Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.'" 944 F.2d at 1008.

The reasoning and result of Chateaugay apply with direct force here and demonstrate the correctness of the decision of the court below. ECRA, like §106 of CERCLA, has no "alternate payment remedy," by which the State can perform a cleanup and later seek reimbursement from the polluter.[11] Torwico's obligation, as

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[11] On the other hand, the Spill Compensation and Control Act("Spill Act"), N.J. Stat. Ann. 58:10-23.11 et seq., like §107 of CERCLA, does have such an alternate remedy in some cases. On page 21 of the petition, petitioner writes at note 20, "Significantly, the law to which the Third Circuit referred is the Spill Act, which the state did not invoke as authority for its administrative order but which does provide the State with the right to recover cleanup costs." The court was not referring to the

the operator of an industrial establishment, to ameliorate the pollution at its former site of operations and thereby halt the migration of the plume of contaminated water that is approaching a potable water supply, does not differ in any legally material way from the type of cleanup order that the Chateaugay Court found to be nondischargeable.

B. The Decision Of The Seventh Circuit In CMC Heartland Is In Accord With The Decision In This Matter.

Similarly, the decision in Matter of CMC Heartland Partners, is not in conflict with the decision in this case. In Heartland, the Seventh Circuit discharged CMC of all obligations as an operator under §106 as well as §107 of CERCLA because this case was filed under the prior bankruptcy law, the Bankruptcy Act of 1898.

There was no "right to payment" language in the definition of a "claim" under the 1898 Act and the United States had failed to file a proof of claim, so even CMC's obligations as an operator under §106 where there is no "right to payment," were discharged.[12] However, the Seventh Circuit ruled that the newly organized corporation that emerged from bankruptcy was now responsible for the cleanup as the new owner of the site because CERCLA claims run with the land. Matter of CMC, 966 F.2d at 1147. Here, too, the Seventh Circuit found that Kovacs

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Spill Act, but to RCRA when talking abut disposing of hazardous substances. Torwico, 8 F.3d at 151. The State has no authority to issue administrative orders to comply with RCRA under the Spill Act, which is why the State did not invoke the Spill Act.

[12] The entire definition of a "claim" under the 1898 Act was "[t]he term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. §205(b)(1978 ed.).

required such an outcome, asserting as it did that only when "environmental loss" has been "monetized" by the conclusion of the bankruptcy case does it constitute a claim that may be discharged. Id.

C. The Sixth Circuit's Decision In Whizco Goes Beyond Kovacs And Is Based On Its Own Facts Which Are Distinguishable From Torwico.

In United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988), the United States had sought to compel a coal company and the coal company's operator to satisfy their statutory obligations to reclaim an abandoned coal mine under the Surface Mining Control and Reclamation Act, ("SMCRA"), 33 U.S.C. §§ 201 et seq. The Sixth Circuit granted an injunction with respect to the corporate debtor, but not with respect to the individual operator in his Chapter 7 personal bankruptcy[13]. The court found that to the extent that the individual operator would have to spend money or be granted access to the site (from which he was barred) in order to comply with the injunction, it was discharged. To the extent that the individual could comply with the injunction himself it was not discharged. This debtor like the debtor in Kovacs had been dispossessed of the site and barred from entry - he did not have the right to enter upon the reclamation site. 844 F.2d at 149. Cf. Torwico, 8 F.3d at 151.

In contrast to the individual debtor in Whizco who was discharged from his legal obligations under federal law, the petitioner here is a corporate debtor, liquidating under Chapter 11 of the bankruptcy code who, just like the corporate debtor in Whizco, is not entitled to any discharge,

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[13] It should be noted that the debtors in both Kovacs and Whizco were individuals entitled to discharge under Chapter 7 of the Bankruptcy Code.

whether of an "obligation" or a "claim". See, 11 U.S.C. 1141(d)(3); see, also, p.6, at note 1, supra. The Sixth Circuit in Whizco, in discussing Kovacs, agreed that the State of Ohio had converted its equitable remedy into a "right to payment" and only wanted money from Kovacs. 844 F.2d at 149-50. The court cited In re Aslan, 65 B.R. 826, 830-31 (Bankr. C.D. Cal.1986)("If the only remedy allowed by law is nonmonetary, the equitable remedy is not transformed into a claim."). Id. The court then acknowledged the limited character of the Kovacs holding and admitted that it was extending Kovacs. Although the facts in Whizco are easily distinguishable from those of Torwico, this case would not present a conflict warranting this Court's intervention in any event because this opinion has had no impact, and has been widely criticized by other circuits.[14]

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[14] It appears that only one case has followed Whizco, while both the Second and Third Circuits have expressly criticized this decision. See, Chateaugay 112 B.R. at 523; United States v. Hubler, 117 B.R. 160, 164 (W.D. Pa. 1990) affirmed without opinion, 928 F.2d 1131 (3d Cir. 1991). But see In re Daniels, 130 B.R. 239 (E.D. Ky. 1991). Daniels is the only reported case to have followed Whizco and it does so only by stating that while "several courts have indicated disagreement with Whizco, this Court is required to follow the Sixth Circuit." Id. at 241. The Court then proceeded to find that by not complying with the law requiring the reclamation of coal mining lands, the action of the debtor constituted a wilful and malicious injury and was therefore excepted from discharge under 11 U.S.C §523(a)(6); see also, Phipps v. Kentucky, 980 F.2d 730(table only; text found at 1992 WL 358480)(6th Cir. 1992) (unpublished) (mining reclamation obligations of individual debtor owed to state were excepted from discharge under Code §523(a)(6) (willful and malicious injury to another entity or that entity's property, even though property did not belong to state). Therefore, if a debtor filed a petition in Cleveland, the end result would be the same as if he filed in Pittsburgh -- contrary to the allegations of petitioner. (Pet. Brief at 18). Perhaps in Cleveland, the court might simply find a different rea..n to insure the same result as in Pittsburgh.

D. Other Courts Of Appeals Decisions Are Not In Conflict With The Third Circuit's Opinion In This Case.

Nor is there any conflict with the Ninth Circuit's decision in re Dant & Russell, Inc., 853 F. 2d 700 (9th Cir. 1988). Dant & Russell did not involve a state attempting to enforce its laws within its police powers for the protection of the public health and safety. It involved a landlord suing a tenant for the full costs of cleaning up property contaminated by the debtor during the course of an expired lease. Again, like Ohio in Kovacs, this landlord only wanted money. It was not a government unit enforcing a law that required performance, for which money could not substitute -- or an obligation which does not give rise to a right to payment.

In fact, the Third Circuit in Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137 (3d Cir. 1985) where a private party who cleaned up sewage sludge from the property of another private party and then, like the State of Ohio in Kovacs, sought to recover its costs -- or in other words, a money judgment -- is noticeably in accord with the Ninth Circuit. Southern Railway, too, is plainly distinguishable from the situation in Torwico and the Third Circuit was in accord with the Ninth Circuit when it ruled that the creditor in that case was clearly seeking payment of a general unsecured claim.

Nor is there any conflict between Torwico and In Re Jensen, 995 F.2d 925 (9th Cir. 1993). Jensen involves two individuals in a Chapter 7 bankruptcy who were discharged from all prepetition obligations and their case closed in 1985. The Jensens were responsible for ten percent of $900,000 spent by the California Department of Health Services ("DHS") to clean up a multi-generator site. The DHS argued that its claim arose post-petition, when the

DHS performed the clean up and obtained a "right to payment". If this theory had prevailed the DHS "claim" against the Jensens for $90,000 would not have been discharged. The Ninth Circuit, however, ruled that the claim arose prepetition - at the time of the release of the hazardous substances - and that therefore the claim was discharged. Jensen, 995 F.2d at 930-931. It is indisputable that Dant & Russel, Southern Railway, Jensen, and Kovacs all involved a clear cut "right to payment" of nothing more or less than money owed to a "creditor" for one reason or another -- even though sometimes the creditor was a government unit. In this case, it is just as clear that the government unit is a regulator without a right to payment and that therefore petitioner's environmental obligations are not dischargeable claims.

III. Although This Court Has Repeatedly Held That The Definition Of "Claim" Should Be Broadly Construed To Include All Legal Obligations Of The Debtor It Has Never Construed A "Claim" As Including Obligations That Do Not Involve A "Right To Payment."

The cases cited by petitioner, Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 588 (1990) and Johnson v. Home State Bank, __ U.S. __, 111 S. Ct. 2150 (1991), neither conflict with the decision below nor justify the Court's granting this petition. Petitioner cites Davenport for the proposition that the term "claim" should be construed broadly. (Pet. Brief at 11). But that case involved criminal restitution payments of money, and does not indicate, as petitioner suggests, that a "claim" can exist without a "right to payment." No matter how broadly the term is interpreted, no one would argue that it need not include a right to payment. Neither the State, nor the Court of Appeals in Torwico, has suggested that a "claim" need not be construed broadly. Nor is the State characterizing petitioner's obligations to the State as outside the definition

of a "claim" due to any unique characteristics of those obligations as Pennsylvania did in Davenport. The State is maintaining that the obligation to comply with ECRA and RCRA is not a claim because these obligations do not give rise to a right to payment, as the definition of a "claim" requires and as every obligation in every case that petitioner alleges a conflict requires as well.

Nor does Johnson dispute this interpretation - in fact, the entire opinion relies on the "right to payment" provided by a mortgage to find that the bank had a "claim" against the debtor's property: "Even after the debtor's personal obligations have been extinguished, the creditor still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtors property." 111 S. Ct. at 2151. The opinion of the Court of Appeals does not conflict in any way with these decisions of this Court and, therefore, does not require this Court to grant this petition.

IV. Petitioner Is Asking This Court To Rule On A Hypothetical Situation In Its Discussion Of Chapter 11 Reorganization Because Torwico Is Not Reorganizing, But Liquidating.

Perhaps most important of all, petitioner is engaging in speculation and is asking this Court to grant certiorari to rule on its hypothetical situations. Petitioner, throughout its brief, repeatedly refers to Chapter 11 reorganizations and what might be the result of nondischargeable environmental obligations to a reorganized[15] and operating debtor -- when

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[15] Regardless of petitioner's doom and gloom predictions as to the effect on reorganization if a debtor must "spend money" to comply with the law, 28 U.S.C. 959(b) requires the debtor to operate in compliance with state law and does not mandate that this requirement is null and void if it costs the estate money.

this matter involves a debtor who has sold its business and is therefore not operating, but liquidating.

The Court of Appeals correctly rejected the view espoused by petitioner that would replace the compliance of private citizens with local public health and safety regulation - with government action. The petitioner erroneously asserts that the opinion below undermines the basic policies of the Bankruptcy Code, the debtor's 'fresh start' and equal treatment for all creditors. (Pet. Brief at 24-25). "The funds a debtor is forced to expend to comply with an environmental agency's order--for example, to remediate a landfill to which the debtor shipped waste years prior to the bankruptcy --will be unavailable to pay the claims of lenders, suppliers, contractors, workers, retirees, tort victims, and other legitimate claimants."[16] Id. at 25. These contentions are without merit.

The petitioner had a legal obligation to operate its potentially hazardous business in accord with applicable police power regulations enacted to protect the public. These legal responsibilities and the concomitant financial obligations associated with compliance significantly increased the risk of petitioner's insolvency and of the erosion or destruction of the collateral to which a lender's

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[16] This, of course, is absurd on its face because the regulatory obligations required here have nothing to do with remediating landfills, nor is this site a multi-generator site as petitioner erroneously suggests or even a site where anyone except the petitioner has ever operated. Petitioner suggests that the State could order the cleanup of a landfill, citing CERCLA §107 (a)(3), 42 U.S.C. §9607 (a)(3). This statute has nothing to do with this case. Moreover, as indicated in Chateaugay, §107 of CERCLA does have an alternate payment remedy. Whether resort to an alternate payment remedy under CERCLA is a dischargeable claim in bankruptcy is not an issue in this case.

security interest might attach. Had petitioner complied with the environmental laws to the fullest of its ability prior to the filing of its bankruptcy petition, the estate funds that petitioner wishes to protect may very well have been exhausted and never become part of the estate anyway. No creditor can be insulated against all business risks as petitioner suggests. As this Court has previously recognized, "it is a fundamental aspect of our free enterprise economy that private persons assume the risk attached to their investments," New Haven Inclusion Cases, 399 U.S. 392, 492 (1970), quoting Penn-Central Merger Cases, 389 U.S. 486, 510 (1968).

Petitioner talks about not thwarting a debtor's reorganization, but in this matter, the debtor is not reorganizing -- it has sold its business and is liquidating -- and therefore nothing is dischargeable. In fact all of petitioner's arguments about the dangers of nondischargeability rarely will apply to a corporate debtor, who is only granted a discharge if reorganizing. 11 U.S.C. 1141 (d)(3). On the other hand, by not requiring a reorganizing debtor to comply with regulations that apply to nondebtors, petitioner is espousing a system that will afford a commercial advantage to a debtor in a Chapter 11 reorganization at great cost to the public. Requiring a debtor to comply with environmental obligations is not "an act" directed at possession or control of the property of the estate. To permit the debtor to walk away from its legacy of pollution as petitioner suggests, because it requires expenditures of estate assets, would permit the debtor to operate in violation of the law and would give the reorganizing debtor a competitive advantage over others -- something Congress clearly did not intend. See, K. Heidt, The Automatic Stay in Environmental Bankruptcies, 67 American Bankr. L. Journal 70, 87.

By maintaining that the state should use public funds under other statutes to perform any necessary cleanup on

petitioner's site, petitioner is advocating a practice whereby the debtor "seeks a fresh start with someone else's property." See, In re Sanderfoot, 899 F.2d 598, 608 (7th Cir. 1990)(Posner, J. dissenting) rev'd __ U. S. __, 111 S.Ct. 1825 (1992). Only in the present case "someone else's property" is the public's money or the public health and welfare. The Third Circuit correctly refused to countenance that result in this case.

CONCLUSION

For all of the foregoing reasons, the State of New Jersey, Department of Environmental Protection and Energy, requests that this Court deny the petition for a writ of certiorari.

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